

CERTIFIED FOR PARTIAL PUBLICATION*
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

**SCHEHEREZADE SHARABIANLOU
et al.,**

Plaintiffs and Appellants,

v.

RONALD M. KARP et al.,

Defendants and Respondents.

A120940, A122167, A122548

**(San Mateo County
Super. Ct. No. CIV 440755)**

It is ordered that the published portion, part II, of the opinion filed herein on February 5, 2010, be modified as follows:

In the paragraph commencing at the bottom of page 25 with “The very definition,”

1. replace the fourth sentence of the paragraph on page 26 commencing with the word “Moreover” with the following sentence: “Moreover, restoring the Berensteins to their former position does *not* mean compensating them for the difference in the price offered by the Sharabianlous and the price later paid by Lo.”

2. replace the sixth sentence of the paragraph on page 26 commencing with the words “In any event,” with the following sentence: “In any event, whether the Berensteins accepted a lower price from Lo because of the discovery of contamination beneath the property or for some other reason, it is clear that the reason is not attributable to the Sharabianlous.”

The revised paragraph reads as follows:

The very definition of rescission is “to ‘restore the parties to their former position.’ [Citation.]” (*Nmsbpcslidhb v. County of Fresno, supra*, 152 Cal.App.4th at p. 959;

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I and III.

accord, *McCoy v. West* (1977) 70 Cal.App.3d 295, 302.) Had the Sharabianlous taken possession of the premises, restoring the Berensteins to their former position would have meant returning their property to them. (See *Goodrich v. Lathrop* (1892) 94 Cal. 56, 58 [the words “same position” in former Civ. Code, § 3407 (enacted by Stats. 1872 and repealed by Stats. 1961, ch. 589, § 5) refer to the subject matter of the contract, i.e., the property; vendor restored to status quo ante by return of property].) Since the Berensteins never parted with the property, there was nothing physically to restore. Moreover, restoring the Berensteins to their former position does *not* mean compensating them for the difference in the price offered by the Sharabianlous and the price later paid by Lo. (See *Goodrich v. Lathrop*, at p. 58.) “If the property can be returned by the vendee in substantially the same condition as when he received it, then the requirements of . . . the code are fully satisfied.” (*Ibid.*) In any event, whether the Berensteins accepted a lower price from Lo because of the discovery of contamination beneath the property or for some other reason, it is clear that the reason is not attributable to the Sharabianlous. (*Shirreffs v. Alta Canyada Corp.* (1935) 8 Cal.App.2d 742, 754-755.) Nor can the money awarded be characterized as the kind of expenses necessarily incurred in connection with the sale that have traditionally qualified as “consequential damages,” such as real estate commissions, escrow fees, or interest. In short, these items of recovery do not fall within the types of damages California courts have found to be proper elements of relief based upon rescission.

There is no change in the judgment.

Respondents’ petition for rehearing is denied.

Date _____, P.J.